Editor's note: Reconsideration denied by order dated June 20, 1980

UNITED STATES
v.
W. G. NICKOL
EVA ROSE NICKOL

IBLA 79-497 Decided May 7, 1980

Appeals from a decision by Administrative Law Judge John R. Rampton, Jr., holding valid as to 40 acres the Mollie R placer mining claim. NM 267.

Affirmed in part and reversed in part.

1. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability -- Mining Claims: Marketability

   A discovery exists where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This "prudent man" test has been refined and complemented by the "marketability" test requiring a showing that the mineral in question can be presently extracted, removed, and marketed at a profit.

2. Mining Claims: Mineral Lands -- Mining Claims: Placer Claims

   Although placer claims may be validated by a single discovery, each 10-acre subdivision embraced by the claim must be mineral in character. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end.

3. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Generally -- Mining Claims: Locatability of Mineral: Generally

Material which is principally valuable for use as fill, sub-base, ballast, riprap, or barrow, for which ordinary earth or rock may be used, is not locatable under the mining laws and was not locatable prior to July 23, 1955.

APPEARANCES: Harry O. Morris, Esq., Albuquerque, New Mexico, for contestee; Demetrie L. Augustinos, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This case has had a long and tortuous career. A contest complaint against W. G. Nickol, Eva Rose Nickol, B. W. Rose, Sybil E. Rose, Betty Ann Rose, Leroy McDowell, Mary F. McDowell, and Jack A. Strom was issued May 18, 1970, by the New Mexico State Office, Bureau of Land Management (BLM), at the request of the Forest Service, U.S. Department of Agriculture. The contest complaint contained three charges involving the Mollie R placer mining claim, located on February 13, 1954, and occupying lots 1, 8, 9, and 16, sec. 34, T. 10 N., R. 5 E., New Mexico principal meridian, Bernalillo County, New Mexico, within the Cibola National Forest:

1. A valid discovery as required by the mining laws of the United States does not exist within the limits of the Mollie R placer mining claim;

2. The land embraced within the limits of the claim is nonmineral in character within the meaning of the mining laws; and

3. The material found within the claim is not a valuable mineral deposit under 30 U.S.C. § 611.

An answer filed by W. G. Nickol and Eva Rose Nickol stated that they had succeeded to the interests of the McDowells by deeds dated May 25, 1955, of the Roses by deeds dated December 12, 1958, and of Strom by deed dated December 24, 1958. They denied the charges and alleged that a discovery of a valuable mineral deposit does exist within the boundaries of the Mollie R placer mining claim.

The matter was heard before Administrative Law Judge Dent D. Dalby (then a Departmental hearing examiner). In his decision of September 24, 1971, Judge Dalby held that the limestone on the

Mollie R placer mining claim was a common variety and not suitable for the manufacture of cement. As no market for the mineral material had been shown to exist on July 23, 1955, the date common varieties of sand, gravel, and stone, inter alia, had been withdrawn from mineral entry, 30 U.S.C. §§ 601-615 (1976), the Mollie R placer mining claim lacked a discovery of a valuable mineral deposit, and was therefore declared invalid. Judge Dalby's decision was appealed to this Board, which, by decision of January 23, 1973, United States v. W. G. Nickol and Eva Rose Nickol, 9 IBLA 117 (1973), affirmed his holding that the subject claim was invalid and his finding that the limestone on the Mollie R placer mining claim was a common variety.

Thereafter, contestees sought judicial review in the United States District Court for the District of New Mexico. By order of October 5, 1973, Judge Howard C. Bratton granted the Government's motion for summary judgment. However, on appeal to the Court of Appeals for the Tenth Circuit, the Court, speaking through Judge Oliver Seth, in Nickol v. United States, 501 F.2d 1389 (1974), reversed the order granting summary judgment. Because there were substantial facts actually and in good faith controverted, Judge Seth remanded the case to the district court for a determination of which facts in the record were the "substantial evidence" supporting the administrative action. Judge Bratton thereafter, by order of January 30, 1975, remanded the case to the Interior Department for further hearing on the question whether the limestone on the Mollie R placer mining claim was a common variety.

This Board, by order of January 15, 1976, remanded the case to the Hearings Division, Office of Hearings and Appeals, for further proceedings as directed by Judge Bratton.

The Government moved to amend the complaint on October 8, 1976, to include two additional charges.

> 1. That the limestone found on the Mollie R placer mining claim could not have been extracted, removed, or marketed at a profit for use in the manufacture of cement between February 13, 1954, and December 24, 1958.
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> 2. That the limestone found on the Mollie R placer mining claim could not have been extracted, removed, or marketed at a profit for use in the manufacture of cement or for any other use claimed by the Contestee during the hearing held on April 7, 1971, as of April 14, 1967, when the Forest Service's proposed Withdrawal and Reservation of Lands was noted and entered on the serial register page maintained and kept for such purposes by the Bureau of Land Management.

Following a hearing held November 2, 1976, at which the only issue considered was the question of common variety, Administrative Law Judge John R. Rampton, Jr., issued a decision on March 8, 1977, denying the motion to amend as untimely and outside the scope of the Court's order remanding the case for evidence on the common variety issue. This decision further held that the limestone found on the Mollie R placer mining claim was of a quality and quantity suitable for removal and use in the manufacture of cement and hence was an uncommon variety locatable under the mining laws. 43 CFR 3711.1. Judge Rampton did not rule on the validity of the Mollie R placer mining claim, stating that his finding of uncommon variety significantly alters the underlying basis for the Board's earlier holding that the Mollie R placer mining claim is void. The case was returned to this Board, which by order of May 5, 1978, again remanded it to the Hearings Division for an Administrative Law Judge to receive evidence and then make the initial determination of the marketability of the limestone on the Mollie R placer mining claim, as he would if the case had arisen in ordinary course.

The contestees filed a motion in the District Court, seeking an order compelling compliance by the Government of the Court's order of January 30, 1975, alleging that the remand of May 5, 1978, by this Board was "for further proceedings on matters which were not in any way, shape, or form within the Mandate issued by this Court." The motion was denied by a memorandum opinion of July 24, 1978, wherein Judge Bratton stated:

> Plaintiffs' Motion raises the basic question whether the determination of the validity of the Mollie R. claim should be made by the Secretary of the Interior or whether it should be left to this Court. Since the Secretary is charged with the primary responsibility for determining the validity of mining claims, Best v. Humboldt Mining Co., 371 U.S. 334, 338 (1963), Cameron v. United States, 252 U.S. 450, 459-60 (1920), his agency should make the initial determination of marketability, upon which issue the validity of the claim depends. The role of this Court in these circumstances is limited to review of the Secretary's decision. See Multiple Use, Inc. v. Morton, 504 F.2d 448, 452 (9th Cir. 1974); Rawls v. Secretary of the Interior, 460 F.2d 1200, 1201 (9th Cir. 1972), cert. denied, 409 U.S. 881. Accordingly to reach a resolution of the issue whether the Mollie R. claim is valid the matter must be remanded to the administrative law judge, as directed by the Interior Board of Land Appeals in its order of May 5, 1978.

Accordingly, a hearing was held on December 13, 1978, before Judge Rampton on the following issues: "Whether there was a market for the limestone prior to December 24, 1958, the date the other six

locators in the association claim, located initially for 160 acres, [transferred their interests] to Mr. and Mrs. Nickol; and as of April 14, 1967, the date of the proposed withdrawal." In his decision of June 4, 1979, Judge Rampton held that the Mollie R contained limestone suitable for the manufacture of cement, i.e., an uncommon variety of limestone. Because, however, there was no market for this mineral as of December 24, 1958, Judge Rampton held that no discovery had been made at that time. A discovery was later perfected, however, upon the construction by Ideal Basic Industries of a large cement producing plant in 1959-60, thus creating a market for claimant's minerals. There being no discovery as of December 24, 1958, the size of the Mollie R was reduced to 40 acres in accordance with 30 U.S.C. § 36 (1976). Both parties appeal from this decision.

[1] Placer mining claims may be located for all forms of deposit, excepting veins of quartz or other rock in place. No such location shall include more than 20 acres for each individual claimant, and no placer mining claim shall exceed 160 acres. 30 U.S.C. §§ 35, 36 (1976).

It is well established that the sine qua non for a valid mining claim located on public land is discovery of a valuable mineral deposit within the limits of the claim. A discovery of valuable minerals under the Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man test" has been refined and complemented by the "marketability test," requiring a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. United States v. Coleman, supra. In the circumstances where land is closed to location and entry under the mining laws subsequent to the location of a mining claim thereon, the claim must be supported by discovery of a valuable mineral deposit at the time of the withdrawal. Cameron v. United States, 252 U.S. 450 (1920); Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974); United States v. Henry, 10 IBLA 195 (1973).

[2] Additionally, although placer mining claims may be validated by a single discovery, each 10-acre subdivision embraced by the claim must be mineral in character. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end. United States v. Meyers, 17 IBLA 313 (1974); United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972). The charge that the land embraced by a mining claim is not mineral in

character is the normal adjunct to a charge of no discovery. Additionally, it can be applied to placer mining claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character. Id. Thus, to the extent that a placer mining claim embraces 10-acre subdivisions which do not have the located mineral present, those portions which are nonmineral in character will be declared null and void.

The questions presented here are these:

1. Was there a discovery of a valuable mineral deposit within the limits of the Mollie R placer mining claim on December 24, 1958, when full title to the claim became vested in W. G. Nickol and Eva Rose Nickol?

2. Was there a discovery of a valuable mineral deposit on the Mollie R claim on April 14, 1967, the date the application for withdrawal affecting lots 8, 9, 16, sec. 34, T. 10 N., R. 5 E., was posted to the official BLM records? (The withdrawal was effected by Public Land Order (PLO) No. 4505, July 22, 1968.)

3. Was there a discovery of a valuable mineral deposit on the date of the hearing, December 13, 1978?

These questions will be discussed in order.

As to the first, W. G. Nickol, testifying at the 1971 hearing, stated that he was a civil engineer involved in road building and construction, and as such, he was interested in finding sources of rock for aggregate and building stone to complement the supplies of sand and gravel in the Albuquerque area. He sought a limestone useful as building stone and thought that the Mollie R claim could provide a reasonably clean limestone, not contaminated by excess shale or other extraneous material. His evaluation was strictly based on his experience and training as a construction engineer, not as a geologist or a mining engineer (Tr. 56-8). Crushed stone was acceptable to the specifications for building roads in New Mexico. He considered the Mollie R claim to be suitable for supplying rock to be used in the Albuquerque area, and thought that a market for quarry aggregate existed in Albuquerque in 1954 (Tr. 62-4). The first quarry on the Mollie R claim was opened in late 1958 or early 1959, and the extracted material was used in the construction of the Lomas Freeway in Albuquerque. Highway construction and repair should provide a continuing market for the quarried stone, competitive in the Albuquerque market (Tr. 64-5).

On cross-examination, Nickol admitted that the limestone would have to be crushed and screened to get an aggregate material meeting the various specifications, depending upon the use. The Mollie R claim was located after examining the general area over a 2-year

period, because it seemed able to produce a quality product (Tr. 69-73). In response to a question from the Hearing Examiner, Nickol stated that the rock could be used for riprap to line stream banks as an erosion retardant, and perhaps for some stone masonry work. The claim was located for a rock quarry and not for a source of cement material. Total sales from the quarry were indicated at about $1,600 for 40,000 cubic yards, all of which rock was used in road building in 1959 (Tr. 74-6). Nickol expressed the opinion that he could have sold quarried rock competitively against river bed sand and gravel in the period from 1954 through 1958, but lack of sales was attributable to the time spent in cultivating a market (Tr. 78).

To sum up, Nickol testified that he had located the Mollie R claim for a rock quarry from which he hoped to obtain rock to be crushed and sold competitively in the Albuquerque market. No sales from this claim were made prior to 1958, and only one sale has been made during the 25-year period prior to the most recent hearing. Nickol did not present any evidence to show that the rock on the Mollie R claim possessed a special or distinct value over that of other stone or material used for the same purposes, i.e., as aggregate for road building or riprap.

[3] Material which is principally valuable for use as fill, subbase, ballast, riprap, or barrow, for which ordinary earth or rock may be used, is not locatable under the mining laws and was not locatable prior to July 23, 1955. United States v. Verdugo & Miller, Inc., 37 IBLA 277 (1978); United States v. Bienick, 14 IBLA 290 (1974). Contestee's inability to show that the limestone on the Mollie R was ever used for other than a common variety purpose prior to December 24, 1958, causes us to conclude that no discovery of a valuable mineral deposit was shown by contestees anywhere on the Mollie R as of December 24, 1958. A deposit of limestone cannot be characterized as a deposit of an uncommon variety of limestone when the claimant fails to show what particular quality or use of the limestone makes it an uncommon variety. United States v. Pierce, 75 I.D. 255 (1968).

On the basis of the record then prevailing, we hold that no discovery of a valuable mineral deposit was shown on the Mollie R at the time the Nickols obtained the outstanding "interests" in the 167.10 acres included within the claim, as the limestone on the claim was being used only as a common variety for road building, similar to other common variety substances. There being no valid claim in 1958, the Nickols took nothing by the transfers from their fellow locators. Consequently, any right of the Nickols to the location must be limited to a maximum of 40 acres, the amount any two locators can hold in a single placer mining claim under 30 U.S.C. § 36 (1976).

As to the second question, regulation 43 CFR 2091.2-5 provides that the noting of the receipt of an application for withdrawal on the official plats maintained by BLM in the office in which the application was properly filed shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including mining and mineral leasing laws to the extent the withdrawal applied for, if effected, would prevent such forms of disposal. Application NM 2074 for the withdrawal of certain lands in lots 8, 9, 16, sec. 34, T. 10 N., R. 5 E., inter alia, from appropriation under the mining laws was filed and noted to the official land status plat in the New Mexico State Office, BLM, on April 14, 1967. The withdrawal was later effected by PLO 4505, 33 FR 10802 (July 30, 1968), which withdrew all of lots 8, 9, and 16, T. 10 N., R. 5 E., from appropriation under the mining laws subject to valid existing rights. Discovery of a valuable mineral deposit on the withdrawn portion of the Mollie R had to be shown as of April 14, 1967. As in the discussion relative to the first question, the only mineral material removed from the Mollie R claim was limestone used for aggregate in 1958-1959. Common variety uses of rock which was not shown to have been able to be mined, extracted, and marketed at a profit on July 23, 1955, is not sufficient to support a discovery. It must be held that on the state of the record as of April 14, 1967, the Mollie R claim was not a valid existing right excepted from the operation of PLO 4505.

The third question involves the validity of the Mollie R claim at the time of the most recent hearing on December 13, 1978. At the hearing held November 2, 1976, Judge Rampton ruled that the limestone on the Mollie R claim was an uncommon variety, but he did not rule on the validity of the claim, stating that the court's remand limited his inquiry to whether the Mollie R contained a common or uncommon variety of limestone. The uncommon determination was made largely as a result of Drill Hole 22, drilled in July 1967 by Boyle Brothers Drilling Company at the request of Ideal Cement Co. The hole was supposed to have been drilled on Ideal's Tijeras No. 37 claim in lot 16 (SE 1/4 SE 1/4) sec. 27, but actually the hole was drilled on the Mollie R claim in lot 1 (NE 1/4 NE 1/4) sec. 34. Analysis of the core from hole 200 showed the presence of some 31 feet of lime kiln formation, a limestone presently being utilized by Ideal in the manufacture of cement after extraction from its patented Tijeras claims in sec. 27.

We agree with Judge Rampton that there is present in lot 1, a subdivision which has never been withdrawn from operation of the mining laws, limestone of uncommon variety suitable for use in the manufacture of cement. We further agree that there is a reasonable prospect that this limestone can be mined and sold at a profit for use in the Ideal Cement plant in sec. 22. These holdings lead ineluctably to the conclusion that a discovery of a valuable mineral deposit is present in lot 1. There has not, however, been any evidence that this

uncommon limestone extends into lots 8, 9, and 16, nor that the limestone in those lots was used other than for fill, sub-base, ballast, or riprap prior to April 14, 1967, when the application for withdrawal was filed by the Forest Service, which application culminated in PLO 4505. And as above noted, material principally valuable for fill or related uses has never been locatable under the mining laws. United States v. Verdugo & Miller, supra; United States v. Bienick, supra.

Accordingly, we hold that the Mollie R placer mining claim originally was located in violation of the mining laws and may now be considered to embrace no more than lot 1. As a discovery of a valuable mineral deposit has been shown to exist within lot 1, the charges of no discovery and common variety material must be dismissed with respect to lot 1. The evidence generally supports the finding that all of lot 1 is mineral in character, leading to dismissal of the appropriate charge. The charge that the limestone on the Mollie R could not have been extracted, removed, and marketed at a profit prior to April 14, 1967, when the Forest Service application for withdrawal was posted to the official BLM records, is sustained as to lots 8, 9, and 16, which, as above discussed, have been declared null and void ab initio.

The charge that the limestone on the Mollie R could not have been extracted, removed, or marketed at a profit for use in the manufacture of cement prior to December 24, 1958, is sustained, but has no bearing on the present status of the claim.

Judge Rampton's decision of June 4, 1979, held the Mollie R valid as to 40 acres, which acreage was to be designated by appellants. While as a practical matter the resulting acreage will be substantially the same, we hereby modify his decision and hold that the claimants have shown a discovery on lot 1, consisting of 41.94 acres.

Exhibits tendered by contestees in their motion to reopen, filed subsequent to Judge Rampton's decision of June 4, 1979, would not alter this result. The motion to reopen is denied.

In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when that claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant still bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Bechthold, 25 IBLA 77 (1976); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is modified to reflect the opinion set forth above.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge